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287177—41

# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 670

SANA LABORATORIES INC., JAMES A. IORIO, AND EDWARD JAMES IORIO, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The memorandum opinion of the District Court denying petitioner's motion to suppress evidence appears at R. 5–7. The opinion of the Circuit Court of Appeals (R. 36–39) is reported in 115 F. (2d) 717.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 6, 1940 (R. 39), and a petition for rehearing (R. 40–47) was denied December 2, 1940 (R. 48). The petition for a writ of cer-

tiorari was filed January 4, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTIONS PRESENTED**

1. Whether the District Court erred in refusing to suppress evidence obtained by Government agents from records of petitioner Sana Laboratories, Inc., which the latter was required, pursuant to regulations, to keep and make available for inspection by such agents.

2. Whether a prior decision of the District Court that the evidence was insufficient to warrant forfeiture of certain alcohol seized on the premises of petitioner Sana Laboratories, Inc., was *res judicata* upon the issue of the alleged unlawfulness of the seizure by the Government agents of certain of the corporation's record.

**STATEMENT**

On December 3, 1936, the petitioners, together with three other persons, filed in the District Court for the District of New Jersey a petition [1] seeking the suppression of all evidence obtained as a result of a search of the premises of the petitioner Sana Laboratories, Inc., on November 7, 1936, and for the return of all books and records belonging to them (R. 12). The facts relating to the obtaining of the evidence and the records, which are summa-

[1] This petition is not contained in the printed record.

rized in the opinion of the Circuit Court of Appeals (R. 36), are, briefly, as follows:

Petitioner Sana Laboratories, Inc., was a permittee under Title III of the National Prohibition Act authorized to withdraw specially denatured alcohol used by it in the preparation of medical and chemical products (R. 36). An Alcohol Tax Unit agent testified that he watched the premises of that petitioner from Monday, November 2, 1936, through Friday, November 6, and on the latter date seized a truck which had removed from the corporation's plant six drums of denatured alcohol, the serial numbers of which had been obliterated (T. 21–23).[2] The following morning, Saturday, November 7, this agent and another agent went to the corporation's plant and were admitted by a watchman at about 8 o'clock (T. 27–28, 42–43). They requested petitioner James Iorio to come to the plant (T. 49–50), and asked him if he knew where the manufacturing records were kept (T. 52). Iorio was unable to locate them (T. 53). Miss Losick, the corporation's bookkeeper (T. 60), came to the plant at about 10 o'clock (T. 58–59, 79). She

[2] Pursuant to stipulation (R. 54), the printed record in this case consists only of certain appendices to the briefs of both sides in the Circuit Court of Appeals, together with the proceedings in that court. The facts in this statement, unless otherwise indicated, are taken from the typewritten transcript of the testimony at the hearing before the District Court on the petition to suppress evidence. A certified copy of this transcript is on file with the Clerk of this Court and will be referred to in this brief by the symbol "T."

located the purchase and sales books and the manufacturing records of the corporation (T. 53), which the agents took and for which they gave her a receipt (T. 59, 107–108). The two agents, in their testimony, several times stated that James Iorio told Miss Losick to give them anything they needed, and one of them in his testimony, on one occasion, said that Miss Losick told Iorio to give the agents whatever they needed (T. 53, 58, 59–60, 109–110).[3] The particular records taken were ones which the corporation was required to keep (T. 59). The agents also seized a quantity of specially denatured alcohol which was on the premises and gave Miss Losick a receipt for it (T. 54–55). Several persons, including James Iorio, were arrested (R. 17).

On Monday, November 9, the agents returned to the plant for the purpose of taking inventory of ingredients used in the manufacture of preparations containing denatured alcohol pursuant to the corporation's permit (T. 87–89). They collected certain invoices covering the purchase of such materials and, when James Iorio told them not to touch anything until he could consult his attorney, the agents placed the invoices in a sealed box and gave the box to Iorio (T. 81–83). He later agreed to give the agents photostatic copies of the invoices, stating that the originals were required to be kept

[3] The printed record contains extracts from the testimony of one of the agents stating that James Iorio instructed Miss Losick to give the agents all the records that they would need (R. 19, 53).

on the premises (T. 83, 89–91). Thereafter, according to the testimony of the agents, Iorio called his attorney and subsequently agreed to give, and did give, the sealed box containing the invoices to the agents on Tuesday, November 10 (T. 84, 86, 88, 91–92).

Petitioners James Iorio and Edward Iorio testified in support of the petition. The former admitted that he told the agents they could have photostatic copies of the invoices, but stated that he submitted under protest to the taking of the originals (T. 117, 129–132); while Edward said that he objected to the taking of the records but was told by his attorney that if the agents "have to take them you can't do anything about it" (T. 142, R. 51).

Following the hearing the District Court on June 10, 1940, denied the motion to suppress the evidence obtained from the records in question, but ordered that the books and papers themselves be surrendered to petitioner's attorneys "subject to inspection by the Government on request at any reasonable time or times * * *" (R. 5–7, 8–9). On appeal to the Circuit Court of Appeals for the Third Circuit the judgment of the District Court was unanimously affirmed (R. 36–39) and rehearing denied (R. 48).

On March 2, 1938, the District Court in which the petition to suppress evidence was filed dismissed, on the ground that the evidence was insufficient, those counts of a libel theretofore filed by the Gov-

ernment which sought the forfeiture of the alcohol seized on the premises of petitioner corporation (R. 10–11, 13, 26–27).

On March 31, 1938, the petitioners and others were indicted in the same District Court for conspiring to defraud the United States of taxes on specially denatured alcohol (R. 30–33). Docket entries indicate that this indictment is still pending (R. 33–34).

## ARGUMENT

### I

Petitioners contend that the Alcohol Tax Unit agents had no authority to seize the records in question without a search warrant; that the unlawful seizure made the agents trespassers *ab initio,* and rendered their entry on the premises unlawful; and that the records having been unlawfully seized, the use of them, or information obtained from them, should be suppressed. They also assert that no consent was given to the taking of the records, and that if consent was given it was involuntary. We submit that there is no merit in the petitioners' contentions.

1. At the outset, it should be noted that petitioners James and Edward Iorio had no standing to question the legality of the search and seizure. It is apparent from the testimony of these two petitioners that the records in question belong to the corporation and not to them (T. 116, 133, 143). And the premises upon which the seizure was made

were, of course, premises occupied by the corporation. It has been uniformly and repeatedly held that the guaranty of the Fourth Amendment against unreasonable search and seizure is a personal right or privilege, available only to those who claim ownership or possession of the premises invaded, or ownership of the property seized.[4]

2. Moreover, the District Court specifically found as facts, from the testimony at the hearing, that the agents were given permission to remove the records from the plant and that this permission was voluntarily given (R. 6–7). Clearly, the testimony of the agents that petitioner James Iorio and Miss Losick stated that the agents were to be given all of the records that they needed (R. 19, 53; T. 53, 58–60, 109–111), and that James Iorio agreed first to give the agents photostatic copies of the invoices and then to give them the sealed box containing the invoices (T. 83, 89–92) was amply sufficient to warrant the finding that consent was given. It is true that the petitioners assert that both James and Edward Iorio "who were alleged to have been the

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[4] *Whitcombe* v. *United States*, 90 F. (2d) 290, 293 (C. C. A. 3d), certiorari denied, 302 U. S. 759; *United States* v. *DeVasto*, 52 F. (2d) 26, 27–29 (C. C. A. 2d), certiorari denied, 284 U. S. 678; *Kelley* v. *United States*, 61 F. (2d) 843, 845–846 (C. C. A. 8th); *Newingham* v. *United States*, 4 F. (2d) 490, 492–493 (C. C. A. 3d), certiorari denied, 268 U. S. 703; *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. (2d) 786, 789 (C. C. A. 3d), certiorari denied, 268 U. S. 688; *Haywood* v. *United States*, 268 Fed. 795, 804 (C. C. A. 7th).

persons giving consent testified that no consent was given" (Pet. 24), but this merely created a conflict in the evidence which it was within the province of the District Court to resolve. There is no basis for any view that the permission to the agents to take the records was in anywise involuntary, for, as the District Court pointed out, "The petitioners knew that the Inspectors had a right to examine the documents in question,[5] and taking the position that they were innocent of any wrongdoing, what was more natural than to voluntarily turn the papers over to the authorities? They had received the advice of counsel in the interim and acted with full knowledge as to their rights" (R. 7). The conclusions which the District Court reached upon the factual questions of consent and voluntariness were obviously not clearly erroneous and, therefore, conclusive upon these issues (see Rule 52, Federal Rules of Civil Procedure). Since the papers were surrendered voluntarily to the agents, there was no seizure in violation of the Fourth Amendment.[6]

3. In any event, it is clear that the petition to suppress evidence was properly denied. There can

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[5] See discussion, p. 9, *infra*.

[6] *A. Guckenheimer & Bros. Co.* v. *United States*, *supra*, at p. 789; *Howard* v. *United States*, 75 F. (2d) 562, 563 (C. C. A. 7th), certiorari denied, 295 U. S. 740; *Lisansky* v. *United States*, 31 F. (2d) 846, 851 (C. C. A. 4th), certiorari denied, 279 U. S. 873; *Schutte* v. *United States*, 21 F. (2d) 830 (C. C. A. 6th); *Dillon* v. *United States*, 279 Fed. 639, 646–647 (C .C. A. 2d).

be no doubt, in view of the provisions of Articles 148 and 167 of Treasury Department Regulations No. 3 (Appendix, *infra,* pp. 12–14), that the Circuit Court of Appeals correctly held that there was no unlawful entry of the corporation's premises and that the agents had the right to inspect the corporate records and papers, and use the information obtained therefrom (R. 38). It is evident from the testimony that the only records and papers taken were those which the corporation was required to keep under the Regulations (T. 53, 59, 81–89, 107–108.)

The only action of the agents which may have been in excess of their authority was the removal of the records and papers from the corporation's premises, but the District Court ordered these returned (R. 8–9). Obviously, no prejudice resulted since, as has been indicated, the agents had the right to inspect the records and papers upon the corporation's premises, and thus could obtain any information which they disclosed. Clearly, as was said by the Circuit Court of Appeals, "the removal from the premises of papers which government agents were * * * entitled to inspect upon the premises did not render sacrosanct information secured from those papers because it was lawfully open to the government" (R. 38).[7]

[7] Since it is immaterial whether the records and papers were removed from the corporation's premises without authority, it is unnecessary to justify their seizure as an incident to lawful arrest.

The decisions of this Court in *Silverthorne Lumber Company* v. *United States,* 251 U. S. 385, and of Judge Learned Hand in *United States* v. *Kraus,* 270 Fed. 578 (S. D. N. Y.), are readily distinguishable. In the *Silverthorne* case there was not, as here, any right of the Government agents to inspect the corporate books and records, and here there was no forcible entry of the corporation's premises, as in the *Kraus* case.

## II

Petitioners contend that the prior decision of the District Court in the libel proceeding against the alcohol seized on the corporation's premises was *res judicata* upon the issue of the alleged unlawfulness of the seizure of the corporation records.

A complete answer to this contention is, as we have heretofore shown, that it is of no moment in view of the right of inspection residing in the agents, that the records of the corporation may have been illegally removed from the premises (*supra,* p. 9). Consequently, even if it were assumed that the decision in the libel proceeding was *res judicata,* that would avail the petitioners nothing.

Moreover, the petitioners have failed to make any showing that the decree in the libel proceeding directing the return of the alcohol seized on the corporation's premises was in any wise predicated upon the legality of that seizure. The decree, in denying forfeiture, merely stated that "there is

not sufficient evidence to warrant the forfeiture of the articles * * *" (R. 10). It is settled that, before the doctrine of *res judicata* can be applied, it must appear from the face of the record or by extrinsic evidence (of which there is none in the present case) that the precise question involved in the subsequent proceeding was determined in the prior suit. *Russell* v. *Place,* 94 U. S. 606; *Oklahoma* v. *Texas,* 256 U. S. 70.

## CONCLUSION

The petition for writ of certiorari presents no important question of Federal law and there is involved no conflict of decisions. We therefore respectfully submit that it should be denied.

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JANUARY 1941.